Re-evaluating Recreational Easements- New Norms for the Twenty-First Century?

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I. INTRODUCTION

This chapter evaluates the underpinnings for the validity of recreational and sporting easements in English law. Recognition of such easements represents a wider functional and progressive approach to easements, incorporating new norms of twenty-first-century active lifestyles into what constitutes an easement. The chapter will seek first to analyse recreational easements by reference to Dyal-Chand's sharing model of servitudes and to Alexander's arguments on the promotion of human flourishing. Secondly, by reference to van der Walt's analysis of the rationale and function of anti-fragmentation strategies, it will be evaluated whether rights to use sporting and recreational facilities should be recognised as easements, and to what extent the proliferation of land burdens represents a shift away from the certainty and predictability of a *numerus clausus* of land rights. Thirdly, the complex dynamics of human and property relationships require a re-evaluation of the potential for greater conflict between dominant and servient landowners in maintaining the facilities for use of the easements, and necessitate a reappraisal of what constitutes possession and control of the servient land. Lastly, an assessment is made of the ex ante restrictions on easements versus their ex post regulation and the need for provisions for modification and discharge of easements. It is argued that sporting and recreational easements should be recognised as valid within the parameters analysed below.

This evaluation is prompted by the decision in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* (hereinafter referred to as *Regency Villas*),[1] which raises some of these issues and acts as a useful starting point for this analysis. An appeal was heard in the Supreme Court on 4 and 5 July 2018. The Supreme Court's decision was published too late for detailed examination in this chapter, but recognises the importance of recreation in modern life and has confirmed that there is room for development in English law, making the analysis of broader conceptual issues in this chapter, which of course apply across different jurisdictions, highly relevant. Prior to the decision, stability rather than innovation had been at the heart of the structural parameters which underlay the instrumentalist approach to recreational rights as easements. *Regency Villas* represents an extension to the scope of the decision in *Re Ellenborough Park*,[2] where rights to enjoy a park by landowners of surrounding properties were acknowledged to be valid easements. The reference to easements to play tennis and

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[1] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 on appeal from [2017] EWCA Civ 238, [2017] 3 WLR 644.

[2] See *Re Ellenborough Park* [1956] Ch 131.

bowls in *Re Ellenborough Park*[3] was *obiter* and the case did not extend the rights generally to sporting and recreational easements.

In the Supreme Court in *Regency Villas*, Lord Briggs (with whom Lady Hale, Lord Kerr, and Lord Sumption agreed, with Lord Carnwath dissenting) demonstrated twenty-first-century vigour in acknowledging that 'recreational and sporting activity … is so clearly a beneficial part of modern life that the common law should support structures which promote and encourage it, rather than treat it as devoid of practical utility or benefit',[4] and in recognising the necessary quality of utility and benefit to the dominant tenement for there to be easements over the Italianate gardens, two outdoor hard-surfaced tennis courts, three indoor squash courts, a putting green, a croquet lawn, the new indoor swimming pool and the 18-hole golf course. The Supreme Court disapproved of the approach of the Court of Appeal in looking at the facilities grant as if it were a grant of separate rights to each facility. As Lord Briggs stated, 'the Facilities Grant is in my view in substance the grant of a single comprehensive right to use a complex of facilities, and comprehends not only those constructed and in use at the time of the 1981 Transfer, but all those additional or replacement facilities thereafter constructed and put into operation within the Park as part of the leisure complex during the expected useful life of the Regency Villas timeshare development …'[5]

Lord Briggs was clear 'that the common law should, as far as possible, accommodate itself to new types of property ownership and new ways of enjoying the use of land'.[6] He was dismissive of past attitudes to 'mere recreation or amusement' as in the *dictum* of Baron Martin in *Mounsey v Ismay*,[7] stating instead that 'the advantages to be gained from recreational and sporting activities are now so universally regarded as being of real utility and benefit to human beings that the perjorative expression "mere right of recreation and amusement, possessing no quality of utility or benefit" has become a contradiction in terms.'[8] Nevertheless, the decision in *Regency Villas* needs to be seen in the context of timeshare owners, where the servient estate was large and run as a commercial business open to the public as well as to timeshare owners – potentially over 150 timeshare owners who were able to act collectively through the Regency Villa Owners' Club.

In relation to indoor easements, the Supreme Court rejected the distinction which the Court of Appeal drew between outdoor and indoor recreational easements.[9] The incorporation of value judgements about land use and recreation was particularly evident in the rejection by the Court of Appeal of recreational indoor games, activities and facilities on the servient land from the scope of easements. These value judgements about the utility and benefit to the dominant tenement were incorporated into the analysis in determining that the modern approach to taking physical exercise is not applicable to recreational indoor games, and this distinction was rightly rejected by the Supreme Court. It is unfortunate that disparate activities such as playing snooker, which is a sport, and watching television, a leisure activity, were grouped together without

[3] ibid 168 (Evershed MR).
[4] *Regency Villas* (n 1 above) [81] (Lord Briggs).
[5] ibid [26].
[6] ibid [76].
[7] *Mounsey v Ismay* (1865) 3 H & C 486, 498, 159 ER 621.
[8] *Regency Villas* (n 1 above) [59] (Lord Briggs).
[9] ibid [90] (Lord Briggs), rejecting the approach of the Court of Appeal at [80] (Vos LJ).

differentiation by the Court of Appeal, for the ostensible reason that they were all to be carried on in the same area (the ground floor of the Mansion House) and on the basis of the reasoning that the right was really no more than a personal right to use chattels and services provided by the defendants. Watching television was rightly rejected for this reason as an easement, but the Court of Appeal was too hasty in rejecting a right to play snooker, because similar objections could be raised in relation to playing tennis or squash, and this was acknowledged by the Supreme Court. As Lord Briggs noted, the fact that the exercise of a claimed recreational easement involves the use of the servient owner's chattels is not in itself a decisive objection: 'it is no objection to the recognition of a right as an easement that it may be exercised over, or with the use of, chattels or fixtures on the land, rather than merely over the land itself.'[10] Differentiation between playing snooker indoors and playing tennis outdoors might also lead to a result which is inconsistent with general norms against discrimination on the grounds of disability, such as seen, for example, in the Equality Act 2010. Because use of many of the facilities relevant to both indoor and outdoor recreation is not possible without the use of chattels, the approach of the Supreme Court is correct.

The Supreme Court also acknowledged that 'while it may be that a restaurant, viewed on its own, is not a recreational or sporting facility, it is perfectly capable of being viewed as part of a sporting or recreational complex.'[11] The Supreme Court did not specifically make a decision in relation to the Court of Appeal's rejection of a claimed easement to use the reception area and its back office, but Lord Briggs acknowledged that it was unlikely that communal parts of the ground floor and basement could have been intended to be excluded from the scope of the easements.[12] The grouping together by location in the basement of the Mansion House of the gym, sunbed and sauna area, and the rejection by the Court of Appeal of claimed easements to use those facilities, was thus rightly overruled by the Supreme Court, which adopted instead a far more balanced and nuanced approach to the use of chattels, allowing the recognition of such easements.

II. RECREATIONAL EASEMENTS, THE SHARING MODEL OF SERVITUDES AND HUMAN FLOURISHING

A. Sharing Model of Servitudes

Easements always involve some degree of the sharing of land. However, the sharing model of servitudes advocated by Dyal-Chand[13] appears to play no discernible role in the recognition of recreational easements in English law, because, as she acknowledges, exclusion – the conceptual opposite of sharing – is the thematic foundation of property law. Exclusion may be considered the defining characteristic of property ownership as a presumptive means of enhancing property's role as a stable basis for market transactions. Sharing appears as the exception to the rule of exclusion. Her view is that it is somewhat ironic that courts recognise sharing by creating exceptions to rights rather than by more actively fashioning remedies to enforce sharing. In doing so, they

[10] ibid [91] (Lord Briggs).
[11] ibid [89].
[12] ibid.
[13] R Dyal-Chand, 'Sharing the Cathedral' (2013) 46 *Connecticut Law Review* 647.

regularly fail to respond to the core problem of exclusion that they are drawn to redressing.[14]

Using a vantage point provided by Oliver Wendell Holmes in the realm of contract law, Dyal-Chand develops a model for enhancing property outcomes and, in particular, for promoting sharing as a preferred outcome in core doctrinal areas, such as those involving claims of nuisance, adverse possession, implied easements and trespass.[15] She develops the 'interest-outcome approach' to better resolve core property disputes based on a model that provides both a modern and specific template for enriching outcomes in property law, since property sharing can be a very modern means of addressing distributional concerns such as those featured in *Regency Villas*. When a property law system is focused on outcomes in any given dispute, it is more likely to recognise opportunities to share. Shared uses are not just a matter of most effectively internalising the externalities of property ownership and use; they also can increase the 'size of the pie', providing more individuals with access to property for the purpose of productive use.[16] This approach also recognises the importance of use and possession over (and, at times, in lieu of) formal title, because use and possession are often legitimate interests that can serve as the basis for finding more equitable outcomes. Implied easements are a pertinent example of courts creating shared interests in land by granting limited rights of access and use to non-owners.

It is true that focusing on legitimate interests, or justified expectations, will muddy crystalline rules that prioritise formal title and exclusion,[17] and a focus on outcomes and reliance interests also could add 'mud'.[18] Indeed, Dyal-Chand acknowledges that there are certain challenges to the model, the most significant of these probably being that the model would create uncertainty and unpredictability of property rights and that this would cause market instability.[19] Nevertheless, the most important feature of sharing under the interest-outcome approach is that it results in outcomes that represent compromises of some sort between the parties' varying interests and require the tangible sharing of land as exhibited in *Regency Villas*. The use of tennis courts, swimming pools and golf courses may be an extension of the meaning of 'utility and benefit',[20] but recognition of the benefits of physical activity in upholding the validity of recreational easements demonstrates elements of the sharing model, enabling incorporation of analysis of broader interests relevant in a dispute. For Dyal-Chand, sharing is a remedial option, but the sharing model is already implicit in some well-recognised easements and the decision in *Regency Villas* demonstrates its osmotic incorporation into the corpus of the definition of easements.

B. Sharing Servitudes and Human Flourishing

It is illuminating to compare Dyal-Chand's analysis with Alexander's examination of governance property.[21] Alexander rarely undertakes specific analysis of sharing, but his

[14] ibid 652.
[15] ibid 654.
[16] ibid 668.
[17] CM Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford Law Review* 577.
[18] Dyal-Chand (n 13 above) 679.
[19] ibid 681.
[20] J Bray, 'More than just a walk in the park: a new view on recreational easements' [2017] *Conv* 418, 439.
[21] See GS Alexander, 'Governance Property' (2012) 160 *University of Pennsylvania Law Review* 1853.

discussion of governance property,[22] defined as multiple-ownership property that requires governance norms to regulate the internal relations between the multiple owners,[23] overlaps significantly with what Dyal-Chand describes as sharing remedies. In van der Walt's view, it could be said that all sharing remedies, in Dyal-Chand's terminology, create such governance property.[24] Governance property aims at achieving certain values, including autonomy, aggregate welfare and the Aristotelian idea of human flourishing. Human flourishing is a pluralistic moral value comprising multiple values, including individual autonomy and freedom, social welfare, community and sharing, and personhood and self-realisation.[25]

Easements are a governance property arrangement because of the proprietary interests of the dominant and servient owners who have conflicting interests, which require mechanisms to co-ordinate and maximise the values of their respective interests.[26] Recreational easements encourage and enable the flourishing of the owners of the dominant tenement, but inevitably inhibit the servient owners by restricting the use of their own land, even if the original servient owners entered into the consensual arrangements freely. The rivalrous nature of property is particularly highlighted by recreational easements and balancing the interests of the owners of the dominant and servient tenements, for example in relation to the allocation of responsibility between them to maintain the facilities, may accordingly be too complex an issue for governance property.

Information theorists would argue for the optimal level of standardisation or the optimal level of systemic complexity for recreational easements.[27] By way of contrast, progressive theorists are attentive to a wide array of factors and concerned that property should not employ simplifying rules that are insufficiently attentive to the values at stake. Adopting a progressive theorist's approach to recreational easements, it is necessary for property to reflect democracy, promote freedom and advance human flourishing with the focus on ends rather than function. Progressive theorists affirmatively value ongoing considerations of whether property rules are serving the proper values and creating appropriate relationships.[28] These regulate how property works as a social ordering device. The result in *Regency Villas* is consistent with a progressive property approach to easements to avoid a result which is unjust to the timeshare owners.

By way of contrast to English law and the approach in *Re Ellenborough Park*,[29] American courts and legislatures have been very responsive to the demands for

[22] For a critique of Alexander's definition of governance property, see S Blandy, S Bright and S Nield, 'The Dynamics of Enduring Property Relationships in Land' (2018) 81 *MLR* 85, 94–95.
[23] Alexander (n 21 above) 1856.
[24] AJ van der Walt, 'Sharing Servitudes' (2015) 4 *European Property Law Journal* 162, fn 1.
[25] Alexander (n 21 above) 1875. See further R Walsh, 'Property, Human Flourishing and St Thomas Aquinas: Assessing a Contemporary Revival' (2018) 31 *Canadian Journal of Law and Jurisprudence* 197.
[26] Alexander (n 21 above) 1862–63. Legal mechanisms could, for example, facilitate increased use of landlords' and tenants' associations.
[27] See TW Merrill and HE Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Journal* 1. See also JB Baron, 'The Contested Commitments of Property' (2010) 61 *Hastings Law Journal* 917, 920, 940, 950.
[28] Baron ibid 965.
[29] *Re Ellenborough Park* (n 2 above).

increasing the availability of servitudes since the time of the Industrial Revolution. By creating exceptions, adopting new categories and changing the content of doctrines received from English law, the courts freed American law from the most severe constraints imposed by classical servitudes doctrine in the nineteenth and early twentieth centuries.[30] The Restatement (Third) of Property Servitudes (2000) adopted the principle that landowners may freely create servitudes unless they are illegal or unconstitutional or violate public policy, and instead shifted the focus to rules of interpretation and doctrines governing modification and termination of servitudes.[31]

The desire for servitudes far outstripped those that could be supplied within traditional limits, and American courts and legislatures responded with pragmatic changes and exceptions that left only vestigial traces of traditional principles.[32] They were able to do so, because American law provided easy access to land title records and provided nearly complete protection against servitudes to purchasers without notice. If the Law Commission reforms are introduced to overhaul implied easements, so that easements are implied only where they are necessary for the reasonable use of the land,[33] recreational easements would have to arise by express grant and be registered, so a similar approach to recreational easements could arguably be adopted in English law. This would not, however, deal with concerns over a proliferation of easements sterilising the use of the servient land. Since the American approach allows for more flexible discharge or variation of servitudes, English law would need to extend its means of ex post control of easements, as discussed in section V.B below.

C. Indoor Recreational Activities

The law of easements has not drawn a general distinction between outdoor and indoor easements, and easements which make use of indoor parts of the servient land have been recognised as valid.[34] If a legal system were simply to exclude recreational indoor games, activities and facilities on the servient land from the scope of easements,[35] this would constitute a rejection of a sharing-oriented outcome approach and of a progressive property approach, instead incorporating an exclusionary, ownership-focused model to indoor activities. An interest-outcome approach would instead take full account of both parties' actual use (or non-use) of the property, in its physical, social and economic context and with due regard for its effect on the community and society at large, and would possibly enable some kind of physical or temporal sharing of the property.[36] Exclusion from the category of easements in relation to indoor activities should not be decided on the basis of what van der Walt terms an on/off switch. An on/off switch only allows the binary option between two opposite outcomes,

[30] S French, 'The American Restatement of Servitude Law: Reforming Doctrine by Shifting from *Ex Ante* to *Ex Post* Controls on the Risks Posed by Servitudes' in S van Erp and B Akkermans (eds), *Towards a unified system of land burdens* (Antwerp, Intersentia, 2006) 109.
[31] ibid 112.
[32] ibid 111. French gives examples of enforceable servitudes for condominium regimes, scenic highways, conservation of agricultural land and wildlife habitat and historic preservation: ibid 109.
[33] Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011) [3.45] and clause 20 of Law of Property Bill.
[34] See, for example, *Wright v Macadam* [1949] 2 KB 744, *Miller v Emcer Products Ltd* [1956] Ch 304, *Heywood v Mallalieu* (1883) 25 Ch D 357.
[35] The approach preferred by the Court of Appeal in *Regency Villas* (n 1 above) [85] (Vos LJ), but rejected by the Supreme Court [90] (Lord Briggs).
[36] Van der Walt (n 24 above) 166.

whereas outdoor easements demonstrate a glider-switch approach,[37] which enables a range of options in between the two extremes.

Use of a gym as an easement requires individual analysis due to the benefits of physical activity and exercise. With the ever-increasing popularity of gyms, which encapsulate a modern approach to exercise, an easement over a gym would be a natural progression of a modern approach to easements. British Columbia is a common law jurisdiction and easements over a pool, gym and sauna were ruled valid in *Strata Plan NW 1942 v Strata Plan NW 2050*.[38] More recently, in *Strata Plan NWS 3457 v Strata Plan LMS 1425*,[39] a recreational facilities easement was accepted as valid with the recreational facilities including a community building with a sauna, whirlpool, kitchen, exercise room, amenity room, changing room and meeting room. The easement had been registered at the Land Title Office when the lands were developed in the early 1990s and the dispute was over responsibility to pay for the upkeep of the easement.

The potential for human flourishing and the 'community' or 'social' interest in land would be acknowledged in taking a broad approach to indoor activities and would not result in the prioritisation of the individualism of private ownership. According to the social obligation norm,[40] property is subject to social obligations and community-driven obligations, and private ownership entails obligations to act or refrain from acting for the purpose of promoting the collective good of the community.[41] Models of sharing and human flourishing are nullified if all indoor recreational facilities are rejected as easements and it is therefore commendable that the Supreme Court in *Regency Villas* did not take that path. Questions over the interpretation and application of the test of utility and benefit, amidst an unarticulated apprehension of opening the floodgates to indoor easements, highlight some of the incongruencies and conflicts with interpersonal relationships which could arise, and which will be examined in section IV.

III. ANTI-FRAGMENTATION STRATEGIES AND CERTAINTY AND PREDICTABILITY OF *NUMERUS CLAUSUS*

The purpose of anti-fragmentation strategies or controls is to prevent an undesirable proliferation of real rights in land.[42] The strategic, systemic application of anti-fragmentation controls might have resulted in a refusal to recognise *any* of the easements in *Regency Villas*. Van der Walt examines the normative framework within which the control strategies are applied and developed and analyses two justifications for anti-fragmentation controls, which are the anti-feudalism narrative and the efficient land-use narrative.[43] The latter narrative explains anti-fragmentation strategies with reference to their promotion of efficient land use or economic efficiency, which focuses on utility.

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[37] ibid 176–77 and see also Dyal-Chand (n 13 above) 664–66 who also uses the switch terminology.
[38] *Strata Plan NW 1942 v Strata Plan NW 2050* (2008) 69 RPR (4th) 67 (BCSC).
[39] *Strata Plan NWS 3457 v Strata Plan LMS 1425* 2017 BCSC 1346, [2017] BCWLD 5382.
[40] GS Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94 *Cornell Law Review* 745, 757.
[41] An example in English law can be seen in Empty Dwelling Management Orders established under the Housing Act 2004. See S Pascoe, 'The Social Obligation Norm and the Erosion of Land Ownership?' [2012] *Conv* 484, 487–91.
[42] AJ van der Walt, 'The Continued Relevance of Servitudes' (2013) 3 *Property Law Review* 3.
[43] ibid 4–5.

A. Relevance of Anti-feudalism Narrative and *Numerus Clausus* to Recreational Easements?

As van der Walt has argued, the anti-fragmentation restrictions that characterise modern property law are, for civil lawyers, specifically anti-feudal guarantors of liberty and autonomy, bulwarks against a slide back into feudalism and oppression.[44] The anti-feudalism narrative describes the abolition of feudalism as a move away from a proliferation of fragmented land rights towards unified and absolute ownership. The problematic remnants of feudalism in English law re-emerge from time to time,[45] but are not an explicit rationale for constructing boundaries for the validity of easements and are at best an implicit force only. In relation to *profits à prendre*, the Law Commission has recognised how they were originally created to facilitate a system of feudal landholding.[46] Medieval law did not have much experience of easements apart from rights of way and rights to water, and profits were much more common and important.[47]

Post-feudal civil law property doctrine, which, according to the anti-feudalism narrative, was aimed at ensuring that ownership remains a unitary, unfragmented right, finds its clearest expression in the *numerus clausus*, or closed catalogue, of nominate real rights in land.[48] Based on the assumed value of a unitary and absolute right of ownership, the idea of a *numerus clausus* of property rights was to promote legal certainty, predictability and transparency as central values of the post-revolutionary scheme of rights. Anti-fragmentation controls such as *numerus clausus* ensured that the limited use-rights that the private owner is allowed to create do not contribute to a renewed erosion or fragmentation of ownership.[49]

In relation to French and Belgian law, Sagaert argues that the restrictive function of the *numerus clausus* is especially relevant because, in the civil law, servitudes are 'the modern translation of feudal burdens'.[50] Van Erp argues that the strict civil law *numerus clausus* doctrine should develop towards a *numerus quasi-clausus*, because some flexibility is needed to regulate new forms of rights in property.[51] He argues that what civil law could learn here from common law is flexibility, which enables property law to be more responsive to economic developments. What the common law could learn from civil law is that closing legal categories creates more legal security and reduces information costs. The question remains what the starting point should be: common law

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[44] ibid 7.

[45] See, for example, I Williams, 'The Certainty of Term Requirement in Leases: Nothing Lasts Forever' [2015] *CLJ* 592, 606–09 in relation to abolition of the *escheat* of freehold land and the feudal underpinnings of the certainty requirement for leases.

[46] Law Commission, *Easements, Covenants and Profits à Prendre* (Law Com CP No 186, 2008) [6.1].

[47] See AWB Simpson, *A History of Land Law*, 2nd edn (Oxford, Oxford University Press, 1986) 107–08.

[48] Van der Walt (n 42 above) 9.

[49] ibid 11.

[50] V Sagaert, 'Party Autonomy in French and Belgian Law: The Interconnection between Substantive Property Law and Private International Law' in R Westrik and J van der Weide (eds), *Party Autonomy in International Law* (Munich, European Law Publishers, 2011) 119, 127 discussed in van der Walt (n 42 above) 9.

[51] S van Erp, '*Numerus Quasi-Clausus* of Property Rights as a Constitutive Element of a Future European Property Law?' (2003) 7.2 *Electronic Journal of Comparative Law*, available at https://www.ejcl.org/72/art72-2.PDF 11-2. See also B Akkermans, *The Principle of Numerus Clausus in European Property Law* (Antwerp, Intersentia, 2008) 118.

pragmatism or civil law theory? In van Erp's view, neither should be the starting point, but rather historical-comparative analysis, taking into account socio-economic factors, should lead the way towards the most workable approach.

Information theorists focus on *numerus clausus* in order to avoid the tremendous information costs that would be imposed if parties were free to create any kind of property rights they might desire,[52] whereas progressive theorists do not take direct issue with the *numerus clausus* principle, but the values which they wish to further cannot necessarily be vindicated in the 'standardized, stripped down form' which information theorists value.[53] Chang and Smith argue that in between the strict *numerus clausus* principle and the restriction-free *numerus apertus* principle, a compromise is to allow property customs, such as complex divisions of property rights or idiosyncratic customs, to create new, *de jure* property forms, where they impose tolerable information costs and prevent *numerus clausus* from becoming a straitjacket on property.[54] Such an approach arguably enables recreational easements to adapt to the twenty-first century.

De Waal argues for an approach that is similar to that adopted in English law, which is an approach that is flexible enough to allow a landowner to do something that was patently not possible in Roman law and that is directly in conflict with the anti-fragmentation impulse of a strict *numerus clausus*: a landowner who has built and established a hotel business on her land could, in terms of the flexible approach, contract with a neighbouring landowner for the right of her hotel guests to stroll and picnic along the shore of a dam on the neighbouring land, and also to register that right as a praedial servitude[55] in favour of the dominant property.[56] Rural servitudes could not be acquired in Roman law purely for the right to stroll on another's land, whereas a different approach was taken to urban servitudes.

In English law, as McFarlane has stated, the significance of *numerus clausus* is how the courts police the most important boundary in land law between personal rights, on one side of the line, and estates and interests in land, on the other, a boundary on which the whole map of property law depends.[57] In common law, the goal of legal certainty and stability is promoted through the requirements for a valid easement under *Re Ellenborough Park*.[58] Although ownership is routinely fragmented, *Regency Villas* highlights an enduring tension at the heart of easement law between, on one hand, freedom to create property rights, which is an embodiment of individual autonomy and economic liberty, and on the other hand, preservation of the unity and absoluteness of

[52] Merrill and Smith (n 27 above) 1.
[53] Baron (n 27 above) 920, 922.
[54] Y Chang and HE Smith, 'The *Numerus Clausus* Principle, Property Customs, and the Emergence of New Property Forms' (2015) 100 *Iowa Law Review* 2275, 2279, 2292–93.
[55] The term praedial servitude derives from Roman law and is used in civil law systems to describe a right which is granted over servient land for the benefit of dominant land. For the distinction between praedial and personal servitudes, see AJ van der Walt, *The Law of Servitudes* (Claremont, Juta, 2016) chs 5 and 6.
[56] MJ de Waal, *Die vereistes vir die vestiging van grondserwitude in die Suid-Afrikaanse reg* (1990) 1 *Stellenbosch Law Review* 1 discussed in van der Walt (n 42 above) 19–20. See also the South African decision in *Hotel De Aar v Jonordon Investment (Edms) Bpk* 1972 (2) SA 400.
[57] B McFarlane, '*Keppell v Bailey* (1834); *Hill v Tupper* (1863) The Numerus Clausus and the Common Law' in N Gravells (ed), *Landmark Cases in Land Law* (Oxford, Hart Publishing, 2013) 1, 3. See also K Gray, 'Property in Thin Air' [1991] *CLJ* 252, 302.
[58] *Re Ellenborough Park* (n 2 above).

ownership, which is an embodiment of legal certainty and security of title. This tension still shapes the doctrinal debate about precisely where the line should be drawn in deciding on the permitted scope of easements.

B. Relevance of the Efficient Land-use Narrative to Recreational Easements?

The efficient land-use narrative is more suited to the analysis of recreational easements and focuses more directly on the utilitarian goal of ensuring or promoting efficient land use. As van der Walt recognises, the efficient land-use argument is sometimes used to argue for the abolition of restrictions, and sometimes for a qualified and flexible adaptation of some of the restrictive devices.[59] The efficient land-use argument usually holds that restrictive strategies serve a legitimate function in modern law, but when circumstances change, overly strict adherence to the restrictive measures and inflexibility have a negative effect on the efficient use of land. On the basis of changed circumstances, they therefore usually argue, in one form or another, for a flexible approach that would retain the beneficial features of the anti-fragmentation strategies while allowing for some deviation where necessary.[60] Recognition of the validity of outdoor recreational easements represents elements of this approach, suggesting that new categories of easements can be created even though they may appear to conflict with traditional restrictions.

A consequence of the recognition of outdoor recreational easements is that a proliferation of land burdens can create an anticommons, which potentially results in underuse of a valuable resource, so that restrictive strategies like *numerus clausus* are justified in so far as they counter the anticommons effect of the proliferation of land burdens. A tragedy of the anticommons occurs when too many parties have the right to exclude and nobody has an effective use privilege with the result that the property is underused.[61] This is potentially foreseeable with recreational easements, where the neighbouring owners may be seeking to avoid concurrent use of the land. Economic efficiency therefore justifies both retaining the traditional anti-fragmentation strategies and introducing new ex post strategies that would reinforce their efficiency in facilitating consolidation of fragmented land-use rights, such as the American mechanisms for discharging or varying easements.[62]

The most significant feature of the efficient land-use narrative is that the normative framework within which it functions is unwaveringly utilitarian. Efficient land use, that is economic efficiency, optimisation of the conditions for free and wealth-maximising use of private property, is the only normative guideline. The real issue with recreational easements in *Regency Villas* might not be fragmentation of ownership, but commercialisation of land rights in the context of timeshare owners who wish to make full use of recreational easements granted to them. However, if an opportunity arose for

[59] Van der Walt (n 42 above) 12–14.
[60] ibid discussing Sagaert (n 50 above) 123–24. See also B Rudden, 'Economic Theory v Property Law: The Numerus Clausus Problem' in J Eekelaar and J Bell (eds), *Oxford essays in jurisprudence – Third series* (Oxford, Oxford University Press, 1987) 237, 245.
[61] MA Heller, 'The Boundaries of Private Property' (1999) 108 *Yale Law Journal* 1163; MA Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621 cited in van der Walt (n 42 above) 21.
[62] Van der Walt (n 42 above) 21.

the servient land to be used for other purposes, more efficient overall land use could be prevented by the holders of the recreational easements.

IV. DYNAMICS OF HUMAN AND PROPERTY RELATIONSHIPS AND CONFLICT BETWEEN DOMINANT AND SERVIENT LANDOWNERS

There is the potential for conflict and friction between dominant and servient landowners, because easements limit the owner of the servient tenement in use and enjoyment of land for the sake of enhancing the use of the dominant tenement. This conflict can be exacerbated when conditions under which an easement is exercised change significantly over time as well as when there are changes in ownership. Principles of 'give as well as take'[63] are necessary to allow a co-existence of rights between landowners, reflected in formal or informal ground rules. Consequently, decisions as to validity of easements must not lay foundations for potential contention. Conflict could arise from the parties having to determine what would be reasonable charges that the servient owner could make for use of services or for the use of chattels, although use of the easement itself would be without payment of any charge or fee for the exercise of those rights.[64] Another source of contention might be establishing what would be reasonable provisions made by the servient owner for regulation of the easements in the ordinary course, such as timings for use, obtaining access to the servient land, provision for use of chattels, tidying, cleaning, etc. A further potential source of tension may derive from the servient owner replacing facilities with those of the same or similar kind. Such factors may add to the problematic relationship between the parties depending on the circumstances.

A. Conflict in Recreational Easements Between Landowners

The issue arises whether potential conflict over the use of land should be a relevant factor in determining the validity of easements and its importance in ex post regulation. The analysis of Blandy, Bright and Nield of enduring property relationships in land has particular resonance in the context of recreational easements due to the need to avoid conflicts in sharing land in order to use the recreational easements. The dynamics approach acknowledges the broad range of legal, regulatory, social and commercial norms that touch on property relationships and recognises that those norms are not rigid, but evolve responsively to the spatial, temporal and lived dimensions of property in land.[65] Such an approach recognises that property relationships are lived relationships that are sustained by their evolution over time to accommodate changing patterns and understandings of spatial use, new rights-holders, relationship needs, economic realities, opportunities and technical innovations,[66] and so can be particularly pertinent to sporting and recreational easements.

Under the dynamics approach, it is necessary to develop a more collective and co-operative way of living to make the easement 'work'.[67] The schema draws attention to

[63] *R (on the application of Lewis) v Redcar and Cleveland BC* [2010] UKSC 11, [2010] 2 AC 70, [48] (Lord Walker) discussed in A Baker, 'Recreational Privileges as Easements: Law and Policy' [2012] *Conv* 37, 42–43. See also Purle J in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564, [48].
[64] *Regency Villas* (n 1 above) Court of Appeal [86] and Supreme Court [32], [67]–[73].
[65] Blandy et al (n 22 above) 85–86.
[66] ibid.
[67] ibid 86.

variety and fluidity, and in particular draws out the relational, that is the contextual and 'between persons' relations, recognising that these property relationships are in part socially constructed. The authors apply to property relationships the key idea from relational contract theory that parties to contracts are 'embedded in complex relations',[68] which is particularly germane to recreational easements. The continuing nature of the relationship is an important feature, affecting the way in which the governing norms are articulated at the outset, and accommodating the possibility that these may need to evolve and be adjusted over time to reflect the dynamics of the relationship between right-holders.[69] Woven within the idea of 'enduring' property relations, therefore, is recognition that as the relationship is sustained through time, there may be a degree of 'give and take' to accommodate changes in the use of land, in the identity of the rights-holders, in external regulatory and economic forces, as well as in the parties' preferences for rigidity or flux. Where there is a dispute over shared space, it may be necessary to resolve not only the disputed property relationship, but also the personal relationship between the parties. If the personal relationship cannot be maintained, the property relationship may also falter.[70] The need to police the easements may, however, militate against recognition of such easements.[71]

Particularly important in the context of recreational easements is the parties' unwritten understandings as to the use of the land which may be factored into the interpretation of the factual matrix. This is demonstrated well by the case of *Bradley v Heslin*,[72] where the temporal nature of enduring property relationships meant that the formal legal easements no longer reflected how the land was laid out or the practices about usage that had developed over the 30 harmonious years before the relationship broke down between successors in title. The decision of Norris J, recognising an easement by estoppel to open and close gates, demonstrates how formal property rights changed over time and how the 'real deal' differed from the 'paper deal'.[73] The parties had evolved self-generated norms throughout the harmonious 30 years and such norms resulted in solutions moulded from 'mud' being transformed into 'crystallised' rights,[74] acquiring proprietary effect. In the majority of lived relationships, the parties simply cannot afford the expense of litigation, so it is the muddy rights that endure in uncrystallised form. The consequence in relation to sporting and recreational easements is that courts should be amenable to recognising their validity, because the parties will develop their own norms to deal with practical difficulties that may arise over use of such facilities.

B. Impact of Occupation or Possession on the Relationship?

Van der Walt also acknowledges the more complex and contested image of human relationships,[75] and how a progressive approach to easements may lead to conflicts

[68] ibid 87, citing R Macneil, 'Relational Contract Theory: Unanswered Questions' (2000) 94 *Northwestern University Law Review* 877, 881.
[69] ibid 87–88.
[70] ibid 89.
[71] This is similar to the rule in contract that specific performance will not be granted if the relationship between the parties requires constant supervision. See, for example, *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.
[72] *Bradley v Heslin* [2014] EWHC 3267, discussed in Blandy et al (n 22 above) 97–98, 102, 108–110. I am very grateful for an unpublished case note on *Bradley v Heslin* [2014] EWHC 3267 shared with me by Professor Alison Clarke.
[73] Blandy et al (n 22 above) 98.
[74] ibid 108 discussing Rose (n 17 above).
[75] Van der Walt (n 42 above) 6.

between landowners due to a shift in power between dominant and servient owners, with greater power for owners of dominant land.[76] An easement will not be valid in English law if it requires the dominant owner to exercise a right to joint occupation or deprives the servient owner of proprietorship or legal possession.[77] If the owner of the dominant land had to take actual occupation or possession of part of the servient land in order to give continued effect to the easement, that might point against the existence of such an easement in the first place. This test appears to be closest to the test of possession and control from *Moncrieff v Jamieson*[78] where Lord Scott rejected the 'ouster' principle that asks whether the servient owner is left with any reasonable use of his land and would instead 'substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land'.[79] Some of the claimed easements in *Regency Villas* may have been so extensive as to leave the servient tenement without viable use.

Such conflicts will be heightened even further if the servient owners were to go out of business and cease to maintain the facilities, and the owners of the dominant tenement would be at liberty to enter the servient tenement to maintain and repair the facilities at their own expense. There would need to be examination of the nature of the works that the dominant owner would undertake, since on one view that could prevent the right claimed being an easement if those activities became so extensive that they amounted to possession or occupation by the dominant owner.[80] This would be a question of fact and degree in each case and would require an individual assessment of each right claimed and the level of maintenance that each relevant facility would require.[81]

The potential impact on the human relationship between the parties of invasive interventions on the servient land must not be overlooked. If the dominant owners can provide their own water supply when they need to fill the swimming pool – if necessary from a tanker – and potentially provide even a filtration plant for the pool, and this would not be regarded as sharing possession of the land on which the pool is constructed,[82] that would nevertheless be intrusive, and there would need to be an analysis of the logistics of organisation on the servient owner's land. Equally intrusive would be if the dominant owners provide their own electricity to light squash courts with a generator or by other means if the owner of the servient tenement cannot be required to provide that electricity through a coin-operated meter system.[83] Further, the dominant owners could mow the grass[84] and take other necessary steps to make the golf course or croquet lawn playable, although if a golf course requires daily mowing to be properly playable, it was acknowledged by the Court of Appeal that might require

[76] Van der Walt (n 55 above) ch 3.
[77] *Regency Villas* (n 1 above) Court of Appeal [60] (Vos LJ) deriving from *Re Ellenborough Park* (n 2 above) 164 (Evershed MR) and see Supreme Court [61] (Lord Briggs).
[78] *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620.
[79] ibid [59]. See also the discussion in Law Commission (n 33 above) [3.188]–[3.211].
[80] *Regency Villas* (n 1 above) Court of Appeal [49]; but see the different view of Lord Briggs in the Supreme Court [64]–[65].
[81] See also N Pratt, 'A Proprietary Right to Recreate: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238' [2017] *Conv* 312.
[82] *Regency Villas* (n 1 above) Court of Appeal [72] and compare the broad brush approach taken by the Supreme Court [64]–[65] and [67]–[73].
[83] ibid, Court of Appeal [68].
[84] See in relation to mowing the grass airfield, *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)* [1976] 1 Ch 13, 24 (Russell LJ).

taking 'actual occupation or possession', but the majority in the Supreme Court did not take such a view.[85]

Due to the problematic effect on the relationship between the parties, rather than securing the right by way of an easement, if the law is reformed to enable positive covenants to bind successors in title, an alternative way this could be dealt with would be for a positive covenant on the servient owner to maintain the pool and the dominant owner to pay a fair share of the cost of this.[86] Servient owners may rightly not wish to be constrained in the use of their own land in such a way, although that would not apply in the *Regency Villas* kind of situation, where the timeshare developer retains land specifically in order to provide the agreed rights and thereby obtains a much higher price for the timeshares. In other scenarios, this would, however, circumvent the limitation in the law of easements that no positive obligation could be imposed on the servient owner. This could impose undesirable clogs on title, except in the context of communal facilities where the sharing of running costs would minimise the burden on individuals.[87]

C. Property Relationships in the Domestic Context – A Proportionality Test?

There needs to be differentiation between, on the one hand, the situation where the servient estate is run as a commercial business providing sporting and recreational facilities and, on the other hand, the situation where the servient and dominant owners are domestic neighbours.[88] Although there is not a distinct demarcation currently, as the law evolves, what may be an easement in a commercial context may not necessarily be an easement in the domestic context, although in both cases it will need to be established whether there is the required element of utility and benefit to the dominant land. Baker has suggested that rights between neighbours which would interfere with reasonable notions of domestic privacy should not be recognised as easements, and where recreational rights interfere with domestic privacy, even expressly conferred privileges should be regarded as merely personal arrangements.[89] Indoor easements have, however, been recognised, such as an easement to use a toilet,[90] and an easement to use a kitchen belonging to the owner of a neighbouring tenement for particular purposes was implicitly recognised as valid in *Heywood v Mallalieu*,[91] although failed for other reasons. As Baker states, rights to share kitchen facilities are more important to commodious living than the use of a tennis court, so greater leeway can be expected with the former.[92] In relation to the upmarket residential context, he argues that recreational facilities could perhaps be supported only where the facility was out of the way of the alleged servient house and covered only a small proportion of its grounds. Such an argument could be used to justify an easement allowing the use of indoor squash courts and tennis courts, and perhaps indoor and outdoor table-tennis tables.

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[85] *Regency Villas* (n 1 above) Court of Appeal [60] and see too Lord Carnwath in the Supreme Court [101]–[105], disagreeing with the approach of the majority at [64]–[65].
[86] Law Commission (n 33) [5.69], [6.30]–[6.31]. See also Baker (n 63 above) 52.
[87] Baker ibid.
[88] Purle J in *Regency Villas* (n 63 above) [64] differentiated the domestic context, but the Court of Appeal did not do so specifically. The Supreme Court did acknowledge some differentiation.
[89] Baker (n 63 above) 48, 53.
[90] *Miller v Emcer Products Ltd* (n 34 above).
[91] *Heywood v Mallalieu* (n 34 above).
[92] Baker (n 63 above) 48.

Van der Walt and van Staden suggest a proportionality test to be incorporated in balancing two prominent common law principles, namely, that the servitude holder has all the rights necessary for the effective exercise of his servitude, and that the servitude must be exercised *civiliter modo*, so as to impose the least possible burden on the servient land.[93] The *civiliter* principle protects the interests of the servient proprietor by requiring that the servitude be exercised reasonably, in a manner that will cause the least damage or inconvenience to the servient property. In the balancing or proportionality analysis, the question is whether avoiding the harm that not awarding the servitude will cause for one party justifies the harm or loss that awarding it will cause for the other.[94] Focus would be on actual use, use interests and the potential for sharing, and a contextual assessment of all competing or conflicting rights and interests is required. In the context of easements in English law, it would, however, be very cumbersome to introduce a proportionality test into the ex ante recognition of easements.

A proportionality analysis can be contrasted with the strong undercurrents of exclusion in the domestic context. This was demonstrated by the *obiter dictum* concerning use of a swimming pool in *Moncrieff v Jamieson*[95] where Lord Scott doubted whether the grant of a right to use a neighbour's swimming pool could ever qualify as an easement, because the swimming pool owner would be under no obligation to keep the pool full of water and the grantee would be in no position to fill it if the grantor chose not to do so. Lord Scott's concern in *Moncrieff* was the considerable and disproportionate imposition on the servient tenement that filling and using a swimming pool would require.[96] English law may now be different from Scottish law on this point, since the right to use an outdoor pool in English law is capable of being an easement, and it would entitle, though not require, the dominant owner to fill the pool if the servient owner did not do so.[97] Nevertheless, a right to swim or play golf may lie on the edge of what can be accepted as a servitude in Scottish law.[98]

Although in van der Walt's and van Staden's analysis, proportionality includes constitutional goals, and there are no such defined constitutional goals in English law, a proportionality test could serve a useful function in the context of recreational easements, especially in the domestic context. It may be that the proportionality test would then be merely a different means of undertaking utilitarian calculus. In practice,

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[93] AJ van der Walt and S van Staden, '"Progressive" Judicial Interpretation of Servitudes and Ancillary Servitude Entitlements – *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson*' (2016) 79 *Journal of Contemporary Roman-Dutch Law* 671, 675–76.

[94] Van der Walt (n 24 above) 197.

[95] *Moncrieff v Jamieson* (n 78 above) [47] referred to in *Regency Villas* (n 1 above) Court of Appeal [71] and Supreme Court [66]. Compare *Grant v McDonald* [1992] 5 WWR 577 where the right to build and use an outdoor swimming pool was regarded as capable of being an easement by the British Columbia Court of Appeal after consideration of *Re Ellenborough Park* (n 2 above).

[96] *Moncrieff v Jamieson* ibid [47] as analysed in *Regency Villas* (n 1 above) Court of Appeal [26]. Vos LJ in *Regency Villas* Court of Appeal [71]–[74] and Lord Briggs in the Supreme Court [66]–[67], [71], [75], [92] disagreed with the *obiter* in *Moncrieff*; in contrast, Lord Carnwath, dissenting in the Supreme Court, saw Lord Scott's concern as being 'unanswerable' in relation to the claimed easement to use the golf-course: [105].

[97] *Regency Villas* (n 1 above) Court of Appeal [72].

[98] See KGC Reid and GL Gretton, *Conveyancing 2016* (Edinburgh, Avizandum Publishing, 2017) 140. See also more generally on servitudes in Scottish law, GL Gretton and AJM Steven, *Property, Trusts and Succession*, 3rd edn (London, Bloomsbury, 2017) ch 13. I am very grateful to Dr Andrew Steven for very helpful discussions and information on servitudes in Scotland.

in nearly every case where a servient owner grants a dominant owner the rights to use sporting facilities, it is because the servient owner is in the business of providing sports facilities or is a charitable or public body whose purposes include the provision of sporting facilities. However, in the domestic context, access to indoor facilities may be far more problematic than access to outdoor facilities, and the impact of enduring property relationships in land and the significance of human relationships within them must not be overlooked in decisions relating to the validity of easements.

V. EX ANTE RESTRICTIONS VERSUS EX POST REGULATION OF EASEMENTS

Ex ante controls prevent or restrict the creation of easements from the outset, while ex post controls provide for the amendment or termination of already existing easements.[99] In English law, the common law mostly provides for ex ante controls as laid down in *Re Ellenborough Park*,[100] while ex post controls would need to be created in or derived from statutory provisions,[101] which would require legislation by way of a reformulated section 84 of the Law of Property Act 1925 to modify or terminate easements in English law. There is some limited ex post control at common law, because an easement will end if an irreversible change of circumstances means that the easement no longer benefits the dominant tenement.[102]

A. Ex Ante Restrictive Controls

Ex ante restrictive controls, in prioritising security and stability of land rights, are justified insofar as they limit the rights which can burden properties perpetually by controlling the freedom of landowners to create new land burdens that will bind successive owners, which might result in inefficient fragmentation. Questions of intergenerational fairness focus analysis on allowing current owners to impose burdens on future generations which may be irremovable.[103] Stricter ex ante regulation of easements also minimises the dangers of idiosyncratic burdens on land. However, ex ante restrictions can be viewed as an infringement of the private autonomy of the parties to an easement and from a contractarian perspective, stability may arguably result from absolute private autonomy.[104]

Crystal rules are exemplified by the traditional rules of easement law which regulate easements ex ante, determining beforehand the content of an easement and denying consideration of anything falling outside those boundaries.[105] French has taken the extreme view in proposing that no restrictive ex ante rules should regulate the creation of servitudes, and all that should be required for the creation of a servitude is that there is a valid contract which is aimed at the creation of a servitude that complies with the

[99] Van der Walt (n 42 above) 4.
[100] *Re Ellenborough Park* (n 2 above).
[101] Van der Walt (n 42 above) 4.
[102] See *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214, [2005] 1 P & CR 30, [12].
[103] See S van Staden, 'Ancillary Rights in Servitude Law' (LLD thesis, Stellenbosch University 2015) 159, citing S Sterk, 'Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions' (1985) 70 *Iowa Law Review* 615, 616.
[104] Van Staden ibid 157 citing RA Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' (1982) 55 *Southern California Law Review* 1353, 1358; BWF Depoorter and P Parisi, 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' (2003) 3 *Global Jurist Frontiers* 1, 6; Sterk ibid 616.
[105] Van Staden ibid 172 discussing Rose (n 17 above).

formal requirements for transactions involving land.[106] Other authors have taken more nuanced approaches, such as Sagaert who asserts that the value of ex ante measures of regulation are found in the extent to which they ensure that burdens placed on land are objectively useful.[107] However, he agrees that a better way to realise the goal of continued usefulness of burdens on land would be to enable the abolition of these rights when they become obsolete. Nevertheless, English law has confirmed the importance of ex ante restrictions in determining the validity of sporting or recreational easements and the need to determine the nature of the works and level of maintenance which the servient owners would be required to undertake for maintenance or repair.[108]

B. Ex Post Regulation of Easements

Van der Walt has argued that the traditional ex ante strategies of preventing fragmentation are becoming increasingly more unsuitable and ex post strategies of correction are more suitable to the dynamic economy of the twenty-first century.[109] In his view, both common law and civil law jurisdictions are gradually shifting away from 'an *ex ante* (common-law rule) preventing the creation of "atypical property arrangements" to *ex post* (statutory and judicial intervention) remedying the negative effects of such arrangements'.[110] The American Restatement (Third) of Property Servitudes provides a good example of a move to ex post controls.[111] Flexibility is mostly linked to new, corrective ex post controls that can rectify the problems caused by inflexible application of the preventative ex ante controls, without abandoning them altogether. The most commonly used argument in support of flexibility is that the law should allow termination or amendment of ageing, obsolete and unworkable land burdens and should allow variation of existing land burdens for the sake of better planning. Permanent, inflexible land burdens create restraints on alienability and produce inefficiency in land markets.[112] The counterarguments are that registration can overcome most problems caused by land burdens and that allowing ex post variation or termination could cause uncertainty.[113]

The ex post regulation envisaged in *Regency Villas* was for the servient owners to make reasonable provisions for regulation of the easements in the ordinary course.[114] However, as already noted, if the grant does not provide agreed regulatory structures regarding, for example, timings and resolution of disputes, then any shared enjoyment must be exercised reasonably, which again is likely to be contested. Another manner of ex post regulation would be to impose time-limits on the existence of all easements.

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[106] French (n 30 above) 112, discussed by Van Staden ibid 173; S French, 'Servitudes, reform and the new Restatement of Property: Creation Doctrines and Structural Simplification' (1988) 73 *Cornell Law Review* 928, 948.
[107] V Sagaert, 'The Fragmented System of Land Burdens in French and Belgian Law' in van Erp and Akkermans (n 30 above) 31, 51 discussed by van Staden ibid 173.
[108] *Regency Villas* (n 1 above) Court of Appeal [60] and compare the Supreme Court [67]–[73].
[109] Van der Walt (n 42 above) 21–22.
[110] ibid 22.
[111] See French (n 30 above).
[112] Van der Walt (n 42 above) 18, 29–30.
[113] ibid 18 citing JA Lovett, 'Creating and Controlling Private Land Use Restrictions in Scotland and Louisiana: A Comparative Mixed Jurisdiction Analysis' (2008) 19 *Stellenbosch Law Review* 231, 244–245. See also B France-Hudson, 'The Recognition of Covenants in Gross in New Zealand: A Dangerous Advancement?' Chapter 11 in this volume, where the author expresses doubts on the effectiveness of ex post controls in analysing covenants in gross in New Zealand.
[114] *Regency Villas* (n 1 above) Court of Appeal [86].

Lovett and Rose[115] support durational limitations on the protection of servitudes, and Lovett proposes a period of 30 years as appropriate for the initial protection stage.

One of the factors that tends to make the law reluctant to add extra rights to the *numerus clausus* is the difficulty of removing a right once it has been attached to land as a burden, so the easing of that will have a knock-on effect on any judicial inclinations towards *numerus clausus*. Even though in practice, problematic easements may be removed by negotiation and payment of compensation, ex post corrective measures to amend or terminate easements to address flexibility problems should be introduced, as the Law Commission has recognised with its proposal that section 84 of the Law of Property Act 1925 be amended and extended so as to apply to easements and profits.[116] Its recommendation is that an easement should only be modified if the Lands Chamber of the Upper Tribunal is satisfied that the modified interest will not be materially less convenient to the benefited owner and will be no more burdensome to the land affected,[117] which will inevitably restrict the jurisdiction for modification. Nevertheless, such reforms are long overdue and will incorporate significant ex post regulation into English law, which will have consequential impact on ex ante restrictions and, accordingly, encourage flexibility. Conversely, if the ex ante controls are relaxed as *Regency Villas* suggests, this makes the case for expanding the ex post controls even more compelling.

VI. CONCLUDING REMARKS

A new normative framework has emerged in the academic literature within which the validity of recreational and sporting easements should depend on a range of contextual factors, recognising that the categories of easements are in need of modernisation in order to be fitting for the twenty-first century. Policy considerations in recognising easements which encourage physical activity are a welcome development. The Supreme Court has removed a potential dichotomy between indoor and outdoor activities, so the negative externalities of indoor easements no longer represent a central paradox, and this development in the law has significant implications for the normative content of easements, conceivably removing a legal lacuna in cases with complex factual scenarios.

This chapter has analysed different conceptual approaches through which recreational and sporting easements can be evaluated. Such evaluation will now be crucial in English law: following the Supreme Court's innovation in *Regency Villas*, the courts will now need to determine the precise scope of recreational and sporting easements. Incorporating notions of sharing and human flourishing would encourage a progressive approach to easements, whilst balancing anti-fragmentation controls such as *numerus clausus* with the efficient land-use narrative may be a catalyst for flexibility within the law. Questions of how to manage the long-term relationship between dominant and servient owners will require co-operative arrangements and mechanisms for the usage of recreational easements. Although the decision in *Regency Villas* needs to be seen in

[115] Van Staden (n 103) 176–77, citing CM Rose 'Servitudes, Security and Assent: Some Comments on Professors French and Reichman' (1982) 55 *Southern California Law Review* 1403, 1414.
[116] Law Commission (n 33 above) [7.35], [7.49], [7.55], [8.52], [8.54], [8.56] and see Law of Property Bill, clauses 30–32 and Sch 2. Note that in *Regency Villas* (n 1 above) Lord Briggs at [79] referred to the Law Commission's proposals.
[117] ibid [7.60], [8.57].

the specific context of timeshare owners, a holistic approach to recreational easements means that there cannot necessarily be neat lines between commercial and non-commercial contexts. The floodgates are unlikely to be opened in the domestic context where a narrow view of recreational easements is likely to prevail.

The conceptual analysis undertaken in this chapter will provide a valuable framework for scrutinising the future development of recreational and sporting easements, not only in England, but also in other jurisdictions. Certainly, a nuanced application of the test of utility and benefit is needed to incorporate fairness and address distributional concerns and anxiety over intrusion on the servient land in recognition of the complex dynamics of human and property relationships. One lesson from the chapter, however, is that the common law rules form only one part of a more complex picture. For example, statutory intervention would be required for a significant shift in the regulation of easements from an ex ante approach, focusing on stability of land rights, to flexible, ex post regulation of easements. Such a shift would add value to land arrangements and enable the law to develop in a progressive but incremental way.